

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 26001-1-III

Appellant,

Division Three

v.

**ELIZABETH HELEN ANN
WESTENSKOW,**

UNPUBLISHED OPINION

Respondent.

Brown, J. — The State appeals the trial court’s dismissal of its perjury prosecution against Elizabeth Westenskow after it ruled the perjury statute, RCW 9A.72.010(1), unconstitutional. *State v. Abrams*, 163 Wn.2d 277, 178 P.3d 1021 (2008) controls this appeal. Because the *Abrams* court decided the perjury statute was unconstitutional, but the invalid clause could be severed from the remainder of the statute, we reverse and remand.

FACTS

Ms. Westenskow told officers her estranged husband hit her on the head with a

beer bottle and signed a document, attesting that her statement was true and correct. But at her husband's trial, she stated that she lied to get her husband arrested. The State partly charged Ms. Westenskow with second degree perjury. "A person is guilty of perjury in the second degree if . . . with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement." RCW 9A.72.030(1). The trial court found the language in RCW 9A.72.010(1) requiring the court to decide materiality as a matter of law unconstitutional and dismissed the perjury charge without prejudice.¹ The State appeals.

ANALYSIS

The issue is whether the trial court erred in dismissing Ms. Westenskow's perjury charge based on the unconstitutionality of the perjury statute. The State contends the court's recent decision in *Abrams* is determinative. We agree.

We review a trial court's ruling on a motion to dismiss for a manifest abuse of discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). An abuse of discretion occurs when the trial court's decision was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Id.* The constitutionality of a statute, however, is a question of law, which we review de novo. *State v. Pirtle*, 127

¹ Eventually, a panel of this court ruled the dismissal was appealable. Ms. Westenskow then requested dismissal, arguing the State failed to properly appeal the correct order. Our commissioner denied Ms. Westenskow's request. She did not move to modify. See RAP 17.7 (a party may object to a ruling of a commissioner "*only* by a motion to modify the ruling"). (Emphasis added.) Therefore, we do not further address our commissioner's ruling in this opinion.

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Wn.2d 628, 656, 904 P.2d 245 (1995).

A defendant has the right to a jury trial on the elements of a charged crime.

Const. art. I, § 21. In *Abrams*, the State charged Mr. Abrams with three counts of first degree perjury. 163 Wn.2d at 281. He argued the perjury statute was unconstitutional because it required one of the elements of the crime, making a “[m]aterially false statement” to be determined by the court rather than a jury. *Id.* at 282 (quoting RCW 9A.72.010(1)). The trial court agreed and dismissed the charges. *Id.* On appeal, our Supreme Court held, “RCW 9A.72.010(1) requiring the court to determine the materiality of a false statement as a matter of law is unconstitutional.” *Id.* at 285. But, the court held that the offending provision could be severed and stricken from the remainder of the statute. *Id.* at 290. The court then remanded for trial on the three perjury charges with instruction that the issue of materiality was to be submitted to the jury. *Id.* at 292. The *Abrams* court lastly held that its holding applied “retroactively only to cases pending on direct review or not yet final.” *Id.*

Like Mr. Abrams, Ms. Westenskow was charged with perjury. The court dismissed the charge, ruling RCW 9A.72.010(1) was unconstitutional. While the trial court was correct, our Supreme Court severed the offending portion of the statute from the remainder of the statute. Since Ms. Westenskow’s appeal was stayed pending the court’s decision in *Abrams*, the holding in *Abrams* applies retroactively to Ms. Westenskow’s case. Accordingly, her second degree perjury charge should be reinstated, leaving the materiality issue for the jury.

Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Sweeney, J.

Korsmo, J.